117-621

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1885.**

No. 138.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

JOHN McELLIGOTT.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

**FILED OCTOBER 18, 1882.**

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1 *Declaration.*

In the Supreme Court of the District of Columbia.

JOHN MCELLIGOTT
*vs.*
THE DISTRICT OF COLUMBIA. } At Law. No. 20872.

The plaintiff sues the defendant, a corporation duly organized in pursuance of law, for money due and payable to the plaintiff by the defendant, for that the plaintiff was employed as a laborer by the defendant to do certain work for the defendant, to wit, digging gravel from a gravel-bank and loading certain carts with the same; that the defendant well knew that in doing said work it was necessary to provide a sufficient number of men to enable those engaged as laborers on said work to observe the bank from which they were digging to prevent the untimely caving in thereof and the falling of gravel on them, and the said defendant also well knew that it was customary and necessary to have a person to watch said bank, and to give timely warning to those laboring under
2 the same, to enable them to escape from the said bank when a portion or the whole of the same was about to fall, yet the said defendant neglected, and although requested by the plaintiff on the 12th day of June, 1878, in the District of Columbia, did not provide a sufficient number of laborers to enable this plaintiff, who was then and there employed by the defendant and laboring in its service in digging gravel from a high gravel-bank and loading the said gravel into carts, to observe the said bank, and also, although the said custom and necessity was well known to the defendant, through the negligence and default of the defendant, no person at the said time and place was provided to watch the said bank and to give timely notice to the plaintiff in order that he might escape when a portion of said bank was about to fall.

By reason of the premises a large portion of said gravel-bank, at the time and place aforesaid, fell upon this plaintiff, and thereby the plaintiff was thrown to the ground, his leg broken, his skull fractured, and he was permanently injured and crippled and
3 permanently rendered unfit for work, and was greatly bruised and injured and incurred expense for medical attendance, to wit, the sum of five hundred dollars, and was and is deprived of divers gains and profits, and was and is hindered from attending to his necessary and lawful business, to the great damage of the plaintiff in the sum of twenty thousand dollars ($20,000), and therefore he brings his suit.

HENRY WISE GARNETT,
ENOCH TOTTEN,
*Attorneys for Plaintiff.*

The defendant is to plead hereto on or before the first special term of the court occur-ing twenty days after service hereof; otherwise, judgment.

HENRY WISE GARNETT,
ENOCH TOTTEN,
*Attorneys for Plaintiff.*

4 *Summons to Answer.*

In the Supreme Court of the District of Columbia.

JOHN MCELLIGOTT
*vs.*
THE DISTRICT OF COLUMBIA. } At Law. No. 20872.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court, on the first day of its special term, occurring twenty days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

R. J. MEIGS, *Clerk.*
By J. R. YOUNG,
*Asst. Clerk.*

Witness: D. K. CARTTER,
*Chief Justice.*

Note: The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of court.

5 *Marshal's Return.*

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant by service on Wm. J. Twining, commissioner, the 11th day of June, 1879.

F. DOUGLAS, *Marshal.*

6 *Defendant's Plea.*

In the Supreme Court of the District of Columbia.

JOHN MCELLIGOTT
*vs.*
THE DISTRICT OF COLUMBIA. } At Law. No. 20872.

The defendant says it is not guilty as alleged.

A. G. RIDDLE,
FRANCIS MILLER,
*Attorneys for Defendant.*

7 *Joinder of Issue.*

In the Supreme Court of the District of Columbia. The 25th day of June, 1879.

JOHN MCELLIGOTT, Plaintiff,
*and*
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 20872.

The Plaintiff takes issue upon the defendant's plea.

ENOCH TOTTEN,
HENRY WISE GARNETT,
*Attorneys for Plaintiff.*

8 *Note of Issue.*

In the Supreme Court of the District of Columbia. The 25th day of June, 1879.

Between JOHN MCELLIGOTT, Plaintiff,
*and*
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 20872.

ENOCH TOTTEN,
HENRY WISE GARNETT,
*Attorneys for Plaintiff.*

A. G. RIDDLE,
FRANCIS MILLER,
*Attorneys for Def't.*

Last pleading filed the 25th day of June, 1879.

HENRY WISE GARNETT,
*For* ———.

To the clerk.

9 *Court Proceedings.*

Proceedings before the supreme court of the District of Columbia, holding a special term at law, Division No. 2, commencing on the 18th day, being the third Monday, of October, 1880.

Present presiding Alexander B. Hagner, associate justice of said supreme court.

* * * * * *

MONDAY, *November 15th*, 1880.

Session resumed pursuant to adjournment, Wylie, justice, presiding.

* * * * * *

JOHN MCELLIGOTT, Pl'ff,
*vs.*
DISTRICT OF COLUMBIA, Def't. } At Law. No. 20872. Cal. 376.

Now comes here as well the plaintiff by his attorneys, Messrs. Garnett & Totten, as the defendant by its attorney, Mr. Riddle, and a jury of good and lawful men of this District, to wit, Maurice Sioussa, George Ferguson, William A. Barnes, James S. Topham,
Moses T. Parker, Adolph H. Eichstadt, John A. Reem,
10 Joseph R. Washington, Robert H. Bontz, Thomas A. Lazenby, John R. Hunt, and Alexander B. Burnes, who, being duly sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

* * * * * *

TUESDAY, *November* 16, 1880.

Session resumed pursuant to adjournment, Wylie, justice, presiding.

* * * * * * *

JOHN MCELLIGOTT, Pl'ff,
*vs.*
THE DISTRICT OF COLUMBIA, Deft. } At Law. No. 20872. Cal. 376.

Now again come here the parties aforesaid in manner aforesaid, and that the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find said issue in favor of the plaintiff, and that the money payable to him by the defendant, by reason of the premises, is one thousand dol-
11 lars, besides costs, and it appearing to the court that said verdict so found by the jury is contrary to the evidence given in the case, and the instructions of the court, the court on its own motion sets said verdict aside, and grants a new trial.

* * * * * * *

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said District, commencing the fourth Monday, the 24th day of January, A. D. 1881.

* * * * * * *

WEDNESDAY, *March* 16, 1881.

Session resumed, pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

JOHN MCELLIGOTT, Pl'ff,
*vs.*
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 20872. Cal. 254.

Now comes here as well the plaintiff, by his attorneys,
12 Messrs. Totten & Garnett, as the defendant, by his attorney, Mr. Riddle, and a jury of good and lawful men of this District, to wit, Edward Gorman, Reuben B. Clark, Asbury G. Appleman, Cornelius T. Bowen, James T. Harrison, George W. Brookes, Joseph T. H. Hall, William G. Toliver, John E. Prigg, Philip M. May, Owen T. Sturges, and Cyrus S. King, who, being duly sworn to try the issue above joined, after a partial hearing of the case, are respited until the meeting of the court to-morrow.

* * * * * * *

THURSDAY, *March* 17, 1881.

Session resumed, pursuant to adjournment, MacArthur, justice, presiding.

* * * * * * *

JOHN MCELLIGOTT, Pl'ff,
*vs.*
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 20872. Cal. 254.

And now again come here the parties aforesaid, in the manner afore-

said, and the same jury that was respited yesterday, who,
13 after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendant, by reason of the premises, is three thousand dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant three thousand dollars, as aforesaid found, being the money payable by it to the defendant by reason of the premises, and $—— for his costs of suit, and have execution thereof.

14 *Motion for a New Trial.*

In the Supreme Court of the District of Columbia.

JOHN MCELLIGOTT
*vs.*
THE DISTRICT OF COLUMBIA. } At Law. No. 20872.

And now comes the defendant and files its motion for a new trial on the minutes of the court:

1st. Because the evidence is insufficient to support the verdict.

2nd. Because the verdict is contrary to the evidence.

3rd. Because the damages are excessive.

4th. On exceptions taken to the rulings and instructions of the court during the hearing hereof.

FRANCIS MILLER,
*Attorney for Defendant.*

March 19th, 1881.

15 *Hearing on Motion for a New Trial.*

SATURDAY, *April 23d*, 1881.

Session resumed, pursuant to adjournment. MacArthur, justice, presiding.

* * * * * * * *

JOHN MCELLICOTT, Pl'ff,
*vs.*
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 20872.

Upon hearing the defendant's motion for a new trial in this case it is considered that said motion be, and the same is hereby, overruled.

16 *Notice of Appeal to General Term.*

In the Supreme Court of the District of Columbia.

JOHN MCELLIGOTT
*vs.*
THE DISTRICT OF COLUMBIA. } At Law. No. 20872.

And now comes the defendant and notes an appeal from the decision of the court overruling a motion for a new trial noted on the minutes of the court.

FRANCIS MILLER,
*Attorney for Def't.*

17 *Case and Bill of Exceptions.*

In the Supreme Court of the District of Columbia.

JOHN MCELLIGOTT
*vs.*
THE DISTRICT OF COLUMBIA. } At Law. No. 20872.

At the trial of this case the plaintiff, to maintain and prove the issues upon his part joined, gave the following testimony, and none other.

JOHN MCELLIGOTT, the plaintiff and witness in his own behalf, having been first duly sworn according to law was examined, and testified as follows:

By HENRY WISE GARNETT:

Question. You are the plaintiff in this case, I believe, and have brought your suit against the District of Columbia.

Answer. Yes, sir.

Q. Will you tell the jury, in the first place, whom you were working for June 12th, 1878, or about that time.

Answer. I was working under the supervisor of roads of the county of the District.

18 Question. Who was the supervisor?

Answer. Mr. Smallwood.

Question. What were you doing under Mr. Smallwood at that time?

Answer. I was worging at loading carts with gravel.

Question. What was your means of livelihood at that time; how did you get your living?

Answer. By my labor.

Question. Do you remember the 12th day of June, 1878?

Answer. Yes, sir.

Question. You state that you were working for Mr. Smallwood at that time.

Answer. Yes, sir; I was working on the other side of the Soldiers' Home, at the gravel bank there, known as the "John Brown Bank," on Mrs. Brown's farm.

Question. And you were loading gravel at that time in the carts?

Answer. Yes, sir.

Question. Who sent you there?

Answer. Mr. Smallwood.

Question. Who was working with you at that time?

19 Answer. There was another man by the name of William Meacham.

Question. Was there anybody else assisting you at the time?

Answer. No, sir; there was only me and him.

Question. You two (2)?

Answer. Yes, sir.

Question. Did the cart drivers do any digging?

Answer. No, sir; they were not there to do anything except to

drive their horses, and there was nobody there to load the carts except Mr. Meacham and myself.

Question. How many carts were there for you and Mr. Meacham to load?

Answer. Four (4) or five (5) carts.

Question. Now, Mr. McElligott, will you just tell the jury how this accident happened for which you make complaint?

Answer. When I went out that morning and saw that I had five (5) carts to load, me and Mr. Meacham did, I sent out word by the first boy to tell Mr. Smallwood to send me two (2) men.

Question. Who was that boy?

20 A. I think it was John Tracy. I told him to tell Mr. Smallwood to send me two (2) men, one to watch the bank and the other man to help load the carts.

Q. What time was it when you sent this message?

A. That was between nine (9) and ten (10) o'clock in the morning.

Q. Why did you want another man to help to load the carts?

A. Because I had too much work to do, and I was not able to keep the carts loaded and going by myself, and there was nobody to help load the carts but myself.

Q. You stated that there were five (5) carts?

A. Yes, sir.

Q. How fast were they coming in that day.

A. Some of the first carts that we loaded in the morning had made four (4) loads and some five, and so on.

Q. Within what time, how far apart in point of time, were these carts?

A. I could not say what time, but carts would be standing there all the time waiting for me.

21 Q. Were you in the habit as laborer of loading carts before that time?

A. Yes, sir.

Mr. MILLER: How long had you been at it?

A. I suppose about twenty-two (22) or twenty-three (23) years.

Mr. GARNETT: What is the custom about loading carts; how many carts are generally allowed to a man?

A. It is very seldom you will see one man loading a cart by himself.

Q. If there is but one man, how many carts do they generally allow him? Is there any custom about allowing a certain number of carts to a man?

A. I could not say, because I did not know the distance they were hauling the gravel.

COURT: Where were you working when you were loading the carts, in a trench or outside?

A. In front of the bank; I was helping to load carts and the other man was digging the banks.

Q. What was he digging?

A. Gravel.

22 Q. What was the job that you were engaged on; were you grading the street, digging gravel, or what?

A. We were loading the carts with a little gravel taken out of the earth.

Q. You were hauling gravel, then?

A. Yes, sir.

H. W. GARNETT: At the time of this accident, where were you standing; how near the bank?

A. I was standing, I suppose, about five (5) or six (6) feet from the bank. I was not close up to the bank. Mr. Meachan looked up and he seen the bank falling and he hallowed to me to get away from the bank. I made away from the bank and something hit me on the head and thrown me down and a part of the bank fell on me and a part on a cart that was backing in.

Q. How high was the bank?

A. From ten (10) to twelve (12) feet high.

Q. You say that you think that you were four (4) or five (5) feet from the base of the bank at the time this accident happened?

23 A. Yes, sir.

Q. When you sent that message to Smallwood did you get any reply from him?

Solicitor for defendant objects to the question. Counsel for plaintiff withdraws the same.

Q. Did you get any answer from Smallwood; you need not say what the messenger told you?

A. I could not say exactly the time of the day, but about twenty (20) minutes after I sent the message I got an answer.

Q. Do you mean to say that it was an hour or twenty (20) minutes?

A. About twenty-five (25) minutes that he came and told me.

Q. Now, did you send Mr. Swallwood any other message that day?

A. Yes, sir; I sent another message by one of the boys.

Q. By what boy did you send that message?

A. By Joe Anderson.

Q. What message did you send by him?

24 A. To send two (2) men, one to watch the bank and the other to help load the carts.

Q. What time in the day did this accident happen to you?

A. As nearly as I remember, I think it was after I went to work, at one o'clock.

Q. It was about half-past one in the day?

A. Yes, sir.

Q. What time did you go to work that morning?

A. It was about, I suppose, half-past eight (8) or very nearly nine (9) o'clock, I guess.

Q. How long after you went to work there in the morning was it that you sent the first message?

A. When I went there to work and saw how many carts I had to

load, I sent for Mr. Meachan, and I said to him, Meachan, that there were too many carts there.

Q. The point I want to know about is how long after you went to work there was it before you sent this first message?

A. I sent it right away when I saw the carts I had to load.

Q. What did you want a man to watch the bank for?

25 A. It is dangerous for a man to be engaged at a bank working without somebody to watch it. If it were falling they would give you word.

Q. Is it customary to have a man to watch the bank?

A. Yes, sir.

Q. Where does he generally stand?

A. On top of the bank.

Q. What does he stand there for?

A. To watch the bank to see if it is cracking.

Q. And if it should crack he hollows to the people below to run out from the bank?

A. Yes, sir.

Q. What was the condition of the bank this morning that you went to work there?

A. Well, about three (3) — from the corner of the bank it was undermined for about four (4) feet. I could not say how long it had been undermined. It was undermined that morning when we went there.

Q. How long a bank was it?

A. It was right long.

26 Q. Where were you standing with reference to this *to this* bank; near the centre or near the end of it?

A. The cart was standing there (indicating); and I was standing on a line with the cart, and the bank being undermined it gave way on that side.

Q. Did you keep your senses about you when the bank fell on you; were you conscious?

A. I did not know anything; and I was carried away.

Q. Where were you carried?

A. Freedman's Hospital.

Q. Who attended you there?

A. Dr. Palmer.

Q. How long were you there?

A. That I could not exactly say; I suppose I was there about four (4) months.

Q. Where did you go after you were discharged from there?

A. I was carried home.

Q. How long after this accident was it before you were able to walk?

A. I was not able to walk. I was as able then as I am now.

27 Q. Have you been able to walk without crutches since that time?

A. No, sir.

Q. Just tell these gentlemen of the jury the injuries you sustained and the damage that was done you by reason of the accident.

A. My thigh was broken right across here, and my hip was out of place, and my skull was injured.

Q. How do you make your living now?

A. I can not make a living; I depend on my wife and little boy.

Q. You do not work at all?

A. I am not able to do anything.

Q. Did this boy Anderson give you any message from Mr. Smallwood in reply?

WITNESS. What is that?

Q. You say you sent a second message by Anderson to Smallwood; did he come back and give you any message from him?

A. He came back and told me that Mr. Smallwood said ——

Q. (Interrupting.) Never mind what he said.

28 Q. You say that you had sent twice to Smallwood to send you two (2) other men, one to watch the bank and the other to help load the carts. If you considered it dangerous to work there without a man watching the bank why did you go to work without that man?

A. Because when he sent me word, and promised to send me men, I continued to work for him on that account.

Q. Because he promised to send you men?

A. Yes, sir.

Q. And that is the reason you continued to work?

A. Yes, sir.

Cross-examination by A. G. RIDDLE, Esq.:

Q. Did the District pay you any wages or do anything for you after this injury?

A. Yes, sir; the gave me at the rate of a dollar a day.

Q. And up to what time?

A. I could not exactly say that I was in the hospital all the time.

29 Q. And did they pay you afterwards?

A. They gave it to me for a short time afterwards.

Q. How long a time in all did the District pay you?

A. I could not say.

Q. How long were you in the hospital?

A. I suppose I was there from four (4), five (5), or six (6) months.

Q. And this pay was continued to you for some time after that—after you got out?

A. Very shortly.

Q. Did they continue to pay you up to the time that you commenced suit?

A. No, sir.

Q. Did you commence suit as soon as they stopped paying?

A. I went to them, and I asked them to give my little boy some work; I had a horse and cart, and they would not give him work in the county roads for it.

Q. I only wanted to know at what time they stopped paying?

30 A. I could not say.

Q. You had worked there at that bank before?

A. Very little; I worked for the District Government very little.

Q. You knew about that bank; you had known about that bank for a number of years.

A. I had been going in and out of there for a number of years.

Q. You had worked there before.

A. Very little.

Q. How long before this time had you been at work at this gravel-bank?

A. I don't know.

Q. What had you been doing the day before this accident?

A. I was idle the day before.

Q. You began work that morning on that bank.

A. Yes, sir.

Q. When you went there had there been a recent fall of the gravel?

31 A. No, sir.

Q. Where were you getting your gravel from?

A. The first thing I did in the morning was, I got a pick and got gravel from the bank.

Q. From the bank?

A. Along the bank.

Q. Up close to the side of the bank?

A. No, sir; about two (2) or three (3) feet from the side of the bank.

Q. Why did you not make a fall of the ground?

A. I had no men to work with me and to watch the bank.

Q. But you had Mr. Meachan there?

A. Yes, sir; but it takes more than one (1) to make a fall.

Q. You say that that bank was undermined when you went there?

A. Yes, sir. From the corner of the bank it was undermined three (3) or four (4) feet.

Q. But it was not undermined all along?

A. No, sir.

Q. And you say that the bank was ten (10) or twelve (12)

32 feet high?

A. Yes, sir.

Q. I suppose it was not as straight as one of these walls, but it was like it?

A. Yes, sir.

Q. How many loads did you get out of there in the morning before you had your lunch at noon?

A. Some of them had taken four (4) loads, some five (5) loads, and so on.

Q. You say that there were five (5) carts there?

A. Yes, sir.

Q. Was that your statement when you testified before?

A. Yes, sir.

Q. How early in the morning did you say that you sent this word to Mr. Smallwood?

A. It was between nine (9) and ten (10) o'clock.

Q. Did you send word by the first driver who went out?

A. Yes, sir; John Tracey; and I told him to tell Mr. Smallwood that we had too much to do.

Q. How soon after that was it before you sent word a second time?

33 A. I do not know how many carts had been loaded, but John Anderson was the big-est boy who was driving, and I told him to tell Smallwood to send a man.

Q. What time was it when you sent the second word?

A. I could not say.

Q. But it was sometime before you had your lunch that you sent second word?

A. It was about an hour and a half before dinner.

Q. You stopped work at twelve (12)?

A. Yes, sir.

Q. And you commenced working again at one (1), before there had been anybody sent there?

A. Yes, sir.

Q. What did you go to work for if he did not send anybody there?

A. Because some of the boys came back and told—

Q. (Interrupting) I am asking you if you did not know that that was a dangerous place to work in that bank without somebody to watch it?

A. I did not suspect that if I had of had help enough.

34 Q. Why did you send for somebody if you did not know that it was dangerous?

A. Because I had too much work to do.

Q. But you wanted a man to watch it?

A. One man to watch and another man to help load the carts.

Q. You knew that it was dangerous?

A. I supposed that it was.

Q. When he did not send a man what did you go to work for in the afternoon; why did you not go out yourself at noon and see Smallwood?

A. Because I wanted to rest myself. The men were sent after I was hurt.

Q. How do you know?

A. Because the boys told me.

Q. Did anybody order you to make a fall of gravel there?

A. We had no other way to get gravel.

Q. Were you told to make a fall of that bank; were you told to throw that bank down?

A. Smallwood did not tell me at that time to throw it down.

Q. Did you try to make a fall of that bank?

35 A. No, sir.

Q. And the bank was undermined some time before?

A. Somebody undermined — and it fell down.

Q. Did Meacham undertake to make a fall there?

A. He did not then.

Q. And did anybody that day, as far as you know?

A. No, sir.
Q. You were simply using what had been there before?
A. There was no gravel there, but Mr. Meacham was picking up what was at the bottom and I loaded.
Q. Did he not undermine the bank?
A. No, sir; it was undermined some time before.

Mr. TOTTEN: As I understand you, Mr. Meacham did not undertake to make a fall there that day?
A. No, sir.
Q. Can you read or write?
A. No, sir?

GIDEON S. PALMER, a witness on behalf of plaintiff, being first duly sworn according to law, was examined, and testified as follows:

By H. W. GARNETT:

Q. You are a physician in this city?
A. Yes, sir.
Q. And have charge of the Freedman's Hospital?
A. Yes, sir.
Q. You know the plaintiff who has just testified?
A. I do.
Q. Do you remember of his being in your hospital in June, 1878?
A. I do.
Q. Will you please tell the jury the circumstances under which he came there and what his condition was?
A. He was suffering from a fracture of the thigh and hip bone, and inflam-ation set in immediately, and on account of the swelling it was impossible to get at a correct diagnosis of his case for several days, in fact until after the time for adjusting the bone had passed, and we could not have fixed it even if we had known
37 it, because it was broken so near to the body at the time. We kept him for four (4) or five (5) months before he got better, and then he went about, and he is just the same now as he was then and he does not make much improvement. I do not know that he will ever be any better than he is now; he may possibly by-and-by be able to do away with crutches and walk with a cane. The fracture of the hip was an oblique one, so far as could be judged; the thigh was broken and we did not succeed in getting the bone entirely back into place, as there was so much swelling that in the first place it was difficult to make any diagnosis of the case for several days; at least for a week it was supposed that he would die from inflam-ation of the bowels; the swelling continued for a number of days after that, extending into the second or third week, I should say; there was also a depression of the skull;
38 there was much suffering by Mr. McElligott on account of inflam-ation of the stomach, which was caused by a pressure on the stomach caused by the bank falling upon —, as I suppose. I think he was in the hospital until November following; I saw him after he went out; he came back several times for liniments

and other purposes; I think he went several days to his home and came back before he was finally discharged.

Cross-examination by A. G. RIDDLE:

I did all I could for him before he was discharged, and he was in as good condition as we could put him in; his lameness now is attributed to imperfect union of the thigh bone; the front part of the hip bone which was broken is slightly displaced; the difficulty attending a perfect restoration was in consequence of in-
39 flam-ation resulting from swelling of the parts and an inability to get the bone in a proper place for a perfect union.

JOHN MCELLIGOTT, the plaintiff and witness in his own behalf, was here recalled, and on examination further testified as follows:

By Mr. GARNETT:

I am, I believe, about forty-six (46) or forty-seven (47) years old; that is my present age as near as I can recollect.

WILLIAM MEACHAM, a witness on behalf of plaintiff, being duly sworn according to law, was examined and testified as follows:

By Mr. GARNETT:

I was working for Mr. Smallwood in June, 1878; he was the man the District government had out there working on these roads;
40 he employed me in picking and shovelling clay and gravel. I remember the day that Mr. McElligott got hurt; I saw the bank begin to tumble and I hollowed to Mr. McEllicott to run; I went out with Mr. McEllicott that morning; no one else was there; I was working in the gravel bed, and we had five (5) carts to load; we went to work at seven o'clock that morning; it was a hard bank, and about twelve (12) or fourteen (14) feet high; it had been undermined two or three days before that, and there was a chamber cut into it; there were two or three messages sent to Smallwood that morning—one by a man named Tracy and another by a man named Anderson; we began to get gravel along in front of the bank in the morning, and by twelve (12) o'clock we had come to this place where it was undermined, and after one o'clock we continued
41 to work along, expecting that Mr. Smallwood would send us men to help load the carts; I was digging and Mr. McElligott was filling the carts; I had been working at that bank off and on for ten (10) or eleven (11) years; it depends altogether upon the distance as to how many carts it is customary to put to one man; I was working as hard as I could to pick enough gravel to load those carts; that bank never falls without a man being there to watch it, as it is very high and has a sandy bottom to it; I was digging gravel at the time the bank fell, and, as I raised my head, I saw the bank come down, and I run as hard as I could; the first cart had gone out and the second cart was being backed in when part of the bank fell on it and crushed; a large part of the gravel fell on Mr.

McElligott, and it buried him; I got him out; after we took
42 him out and carried him down in a cart to home, and sent for a doctor; we carried him to the hospital; it is usual when the bank is undermined and you want to make a fall to have a man on top to watch the bank; we did not make a fall that day; the bank fell itself; the bank was undermined, and there was a chamber cut into it.

Cross-examination by Mr. F. MILLER:

We did not have a man there watching all the time while we were at work, but only when there was going to be a fall of the bank; sometimes it would fall of itself, but when we wanted to make a fall, intended to make a fall, somebody was always sent to work at it and another man to watch; I was digging this day at the
43 bottom of the bank; I had worked there ten (10) or eleven (11) years, and Mr. McElligott had worked there; I knew all about the bank, and had made a great many falls there; we were not expecting a fall that day, and I had no idea that it was going to fall; I did not dig any of the bank that day; I left it just as it was in the morning when I went there.

Re-direct examination by Mr. GARNETT:

The reason why the bank fell down was because the chamber was cut and the bottom of the bank was undermined; it is not safe to stand under a bank that has been undermined; a man to stand under it may as well give up his life; the dirt that was put
44 in the carts that hauled it away that day was got from underneath where this chamber was cut, there was no digging or chipping into the bank that day by anybody.

JOHN TRACY, a witness on part of plaintiff, having been first duly sworn according to law, was examined, and testified as follows:

By H. W. GARNETT:

My business is driver of horses, in June, 1878, I worked for Smallwood, superintendent of county roads; he employed me; I hauled gravel on the 12th day of June, 1878, from Brown's gravel bank; it was about half past eight that morning when we went to work; Mr. McElligott, Meacham, Dailey, and Connolly were there when I went to work; we had seven (7) carts in the morning, but Mr. Smallwood took two (2) carts away; Dailey and Connolly
45 went with those carts; they went away between eight (8) and nine (9) o'clock; Mr. McElligott told me to tell Smallwood to send two (2) men out there, one to help load the carts, and that the other might have an opportunity to watch the bank in case of danger. I delivered the message to Smallwood, at Mr. Brown's, between nine (9) and ten (10) o'clock, and he said that he would send men, but he did not do it until after Mr. McElligott was hurt; I told Mr. McElligott what Smallwood said; I have been engaged in the business of hauling gravel for six or seven years; it is necessary to have a man to watch the bank when people are digging under a

gravel bank; the bank was undermined that morning when we went there; it is not safe to work at a bank like that without having it watched; I was there when this accident happened; that day
46 we were hauling three-quarters (¾) of a mile, in the neighborhood of that; it took me about (25) twenty-five minutes to make the trip; I saw the accident to Mr. McElligott, and helped to get him out; my cart was not the one that was broken in the accident, but Mr. Shea's. Mr. McElligott was somewhere between five (5) and six (6) feet from the gravel bank when it fell upon him; it was five minutes after Meachan hollowed before the bank caught McElligott; the whole bank fell on him, and it was clean up to his neck; he was knocked flat out, and his leg was doubled up under him; he did not have his senses; he could not speak.

Cross-examination by A. G. RIDDLE:

I had worked there the day before; I could not exactly say whether I had worked there the day before that or not; well I could not exactly say who was working with me the day before
47 the accident; Meacham and McElligott both were; I could not exactly say whether they worked there the day before or not; I suppose I had been working there a couple of days hauling gravel away before this accident happened; I do not know who undermined the gravel bank; I know that it was undermined; the place was undermined somewhere about a foot and a half and seven (7) or eight (8) feet long; I do not exactly know the whole width of the gravel bank; it was somewhere about twenty (20) feet, I guess; there was a fall of gravel there some time before the morning of the accident; they picked the gravel up to load the carts from the ground and did not undermine any; there were seven (7) carts there that morning and two (2) went away somewhere; it was
48 between nine (9) and ten (10) o'clock when McElligott gave me this message to deliver to Smallwood; I suppose I had hauled three (3) loads before I took the message; it would take me about twenty-five minutes to take a load to the place where we dumped it and return back; it took about twenty minutes to load it.

Q. What did McElligott tell you to say to Smallwood; use his exact language?

A. McElligott told me to tell Mr. Smallwood to send a couple of men in to load the carts and watch the bank; they were not going to make a fall of gravel.

Q. What did he want to have the men watch the bank for, did he say?

A. He wanted men to help load the carts. He did not say anything to me about watching the bank. He simply sent a
49 message by me for Smallwood to send two (2) men to help load these carts, and that was all. He did not at any time say that he wanted a man to watch the bank. I don't recollect his sending a message by any one to Smallwood that he wanted that he should send a man to watch the bank; I don't recollect that I heard anything said about a man to watch the bank before this accident. I told Mr. Smallwood that Mr. McElligott said send a couple of men

to help load the carts. I found Mr. Smallwood near Mr. Brown's. I delivered the message to Mr. Mahoney. Smallwood said that he would send a man or two. I do not remember whether on the last trial of this case I stated that I delivered the message to Mahoney and not to Smallwood.

50 Re-direct examination, by E. TOTTEN:

I have no recollection of having seen Mr. Smallwood at that bank that morning. Mr. McElligott said that he wanted men to help load the carts; to keep the carts going; that they were coming in too fast. I delivered the message to Smallwood what Mr. McElligott told me. I do not recollect whether what McElligott told me to tell Smallwood was to send men to watch the bank or load the carts. McElligott told me to tell Smallwood to send a couple of men to help load the carts; to keep them out. I delivered whatever message McElligott told me to tell Smallwood, no matter what it was. I told Mr. McElligott that Smallwood said he would send a couple of men. It was about fifteen minutes after I saw him that I told Mr. McElligott what Smallwood said. Smallwood said that
51 he would send a man or two; but he did not send any men there until after the man was hurt. Then three (3) men were necessary to load five (5) carts that were hauling from that bank; we had but two.

JOSEPH ANDERSON, a witness on part of plaintiff, having been first duly sworn according to law, was examined and testified as follows:

By H. W. GARNETT:

My business is cart-driver, and was in 1878, and I was working for Mr. Smallwood at that time, who had charge of the county road; it was between eight (8) and nine (9) o'clock that I went to work at Brown's gravel pit; Mr. McElligott told me to tell Smallwood
52 to send a couple of men to help load the carts and watch the bank; it was between nine (9) and ten (10) o'clock when he gave me that message, and I delivered it to Smallwood, who said all right; I did not tell Mr. McElligott what Smallwood said, and I was not at the bank at the time of the accident. Mr. Smallwood employed and discharged me.

Cross-examination by A. G. RIDDLE:

I cannot tell where I worked the day before the accident; I was hauling my first load when Mr. McElligott gave me the message; I did not hear Mr. McElligott give the message to Tracey; I don't know how many carts there were, nor do I know how many men; I don't remember whether there more than three (3) carts,
53 nor do I remember whether there were more than four (4); I don't know whether there was five (5). Mr. McElligott told me to tell Mr. Smallwood to send him a man or two to help load the carts and watch the bank; I don't know what he wanted the bank watched

for; he (McElligott) did not say why; I did not say to Mr. Elligott what Smallwood said, as I did not go back to the bank any more.

And here the plaintiff rested.

And thereupon the defendant, to maintain and prove the issues upon its part joined, offered — gave the following testimony, and none other:

54 GEORGE T. SMALLWOOD, a witness on behalf of defendant, having been duly sworn according to law, was examined, and testified as follows:

By A. G. RIDDLE:

In the month of June, 1878, I was supervisor of county roads; my duty was to keep the roads in repair. I had horses, carts, and men employed daily, except Sunday; I was acquainted with the gravel bank known as "John Brown bank," and we were in the habit of getting gravel from that bank for the roads in that section, as it was peculiarly adapted to the purpose; the bank was higher or lower in height, varying from one foot to twelve (12) or fourteen (14) feet in some places; my place was in patching roads, which
55 we were, on this 12th day of June, to have gravel prepared already to be hauled away, and then to send such a number of carts and such a number of men to attend to the carts as would be necessary to keep the men at work; on this occasion we started out with five (5) carts, and this bank was on the road to work, and most of the men stopped at the bank to load each of the five (5) carts; then the men that we took on the road for work went on with the loaded carts, leaving Meacham and McElligott to attend to the carts as they should return; one of those five (5) carts went to Brightwood and did not return that day to work, so that we had then left four (4) carts, and one of those carts was engaged a good deal in hauling paving stones for two men that were paving along the
56 road side, so that sometimes there were only three (3) carts left at that bank on that day, and, in my judgment, two (2) men were amply sufficient to keep these four carts at work on the length of haul, which was twenty (20) to twenty-two (22) minutes going and coming one way, so that it would take from forty (40) to forty-five (45) minutes to make the round; it would take about five (5) minutes to fill the carts; I was at that bank nearly every day; I know what its condition was as to having gravel ready to be loaded on the morning of the 12th; I employed Mr. Meacham for the particular purpose of working on that bank; he did little else but work there by himself and prepare gravel to be hauled away on this patch work, so that with the gravel ready we put the whole
57 force of carts and men there, leaving only one man on the road to receive the gravel; then I was always present myself to see that everything was right, but I never could put a man to watch the bank where there was only two (2) men at work and there was no intention to make a fall; there was no necessity whatever for making a fall on the 12th for our work; we generally had a man

to watch the bank when we were getting out gravel, but this was only patch work; by getting out gravel I mean, when we had a road to gravel we would put a large force at work at the bank, sometimes from twenty (20) to thirty (30) men, and then we would be making falls constantly; the method of making falls was to undermine the
58 bank and then to make what is called a chamber, which is a niche in the bank from top to bottom, and then another one at such a distance as you may wish according to the fall that you desire to make, or according to the character of the gravel of which the bank is made. In some banks you can make a wider fall than in others because of the particular kind of gravel. We always make these chambers into the sides of the fall of the bank, and a wedge driven into the top of the bank will split it from one chamber to another. There had not been, to my knowledge, any preparation for a fall on the morning of the 12th, but there was gravel that had been thrown down sufficient to consume that day.
59 I never had a watchman at the bank except when I had a large force of men there and was making falls. I have not the slightest recollection of receiving any message from the plaintiff or anybody else at the bank to send additional assistance during any part of the day of the accident. I have no recollection and am not aware of getting message from anybody that they wanted somebody to watch the bank. The first that I ever heard that such a thing was claimed was when this trial came on. I did not send any other hands at that bank that day, as, in my judgment, two (2) men were sufficient; I did not intend to reinforce them during the day, and did not. I went to the bank shortly after the accident occurred, on hearing of it, but the parties had gone when
60 I got there; they were all down at Mr. Meacham's when I got there. I think Mr. McElligott had worked at that bank before; he was working off and on, like many other men. Meacham was employed by me especially to work there and have the gravel prepared for hauling. Mr. McElligott had not any charge of the bank, but was simply there as a laborer to fill the carts. Meacham was there for the same purpose.

Cross-examination by Col. TOTTEN:

I was suyervisor of county roads for the middle district; it extends from Boundary to the District line, north and south, and from Rock creek to the Eastern Branch, east and west. Whenever I wanted men I employed them, and when I got through I discharged them; I had charge of the work—engaged in repairing the road,
61 digging gravel, and the like; I was there in the morning when the carts first went to work, which was pretty near seven o'clock; there were five (5) carts at that time at work; I withdrew one (1) of them as soon as it loaded and sent it on to Brightwood; that did not come back, and it could not have come back without my knowing it; I can tell you whose carts they were; I kept a memorandum of this work, the place where the men worked, where the carts worked, what the carts were doing, and I have an abstract of all this work; I made it when the case came up

before, and it has been in my hat ever since; I took it from a book, which I will entrust to your examination any time you please; there was a cart belonging to John Hays, driven by John
62 Tracey; another belonging to Con. Shea, driven by Michael Shea; another belonging to a colored man named Brown, driven by himself; Murray's cart, driven by Anderson, and a cart belonging to John Shea that worked at Brightwood on the day with a man by the name of Michael Sullivan and another man by the name of Condon; Con. Shea's cart was broken down when this bank broke in; I did not say that the bank was undermined that day or the day before, and I do not know that it was; I have no recollection of seeing it undermined that day; if I had been there that morning I would have noticed it; the gravel that was laying at the bottom of this bank had been cut out some time before the accident; it had not been cut out from the bank, but picked
63 up from the soft ground at the bottom of the bank; we had been taking gravel out of that bank for probably eight (8) months; I do not know whether anybody had taken gravel from that bank the day of the accident or the day before; I did not say that I did not have men at the bank unless there was a liability of the bank falling, but said I never had a watchman on the bank any day where one cart came into the bank at a time, and I did not consider it necessary, where there is only two (2) men to get the carts ready with gravel, to have any watchman; there is no necessity for a watch at this bank where there is no liability of the bank's falling.

I don't pretend to account for this accident; it is beyond my comprehension; there is no doubt about the bank falling, but
64 what they had been doing to it I cannot state; I did not give any instructions to have any fall made and I had no intention of having falls made; I kept Meacham there, and I think he has made falls there by himself without any watchman; it is not likely that I would forget about receiving a message such as McElligott said he sent; I have not a bad memory; the work was scattered that day; the force was small, and we had work going on in a great many different places; I swear that I have not the slightest recollection of receiving either of these messages; I did not send anybody there after McElligott was hurt; I did not send anybody to take his place; the men were paid a dollar a day; the em-
65 ployment was not steady; we gave the work to the men in the District; so distributed it that each man could get a fair share, and Mr. McElligott had his turn off and on; I always gave him work when I could; he generally worked pretty well.

Re-direct examination by A. G. RIDDLE:

In connection with the fact that there was an accident there that day, I do not think that it is possible that I could have received a message and have forgotten it; promptly after this accident occurred I heard of it, and went to the bank; other parties were in the habit

of resorting to that bank for gravel, beside the District; I
66 don't know whether there had been any others in there the day previous or not; I had given no orders to make a fall of the gravel there.

And here the defendant rested.

And thereupon the plaintiff in rebuttal offered and gave the following testimony:

WILLIAM MEACHAM, a witness on part of plaintiff, was recalled, and testified as follows:

By H. W. GARNETT:

This chamber or cut had been in the bank a few days before the accident, from two (2) to three (3) days. Smallwood had been to the bank after that cut was made. I cut this place in the bank.

The testimony on both sides having been closed, the defendant, by its counsel, asked the court to grant the following prayers
67 and instructions, to wit:

1st. It is implied in the contract between the plaintiff and the District of Columbia that the plaintiff risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engaged for compensation, among which is the carelessness of those in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest.

2nd. If the jury find from the evidence that Smallwood
68 was an employé of the District of Columbia, in charge of the work upon which the plaintiff was engaged, the plaintiff cannot recover in this action for the negligence of Smallwood in this particular instance unless he has further shown that Smallwood was incompetent and unfit for the discharge of the duties of his position, of which said District had, or ought to have had, knowledge.

3rd. When the plaintiff was employed by Smallwood to work at the gravel-bank, he, in contemplation of law, took upon himself all the natural and ordinary risks incident to the work in which he engaged; and among these was the risk arising from the negligence of his fellow-workmen, including Smallwood.

69 4th. If the jury find from the evidence that the plaintiff had been engaged in the business in which he was injured for ten or eleven years, and was familiar with all the necessities and perils of that business, and with such knowledge he deliberately exposed himself to the danger of the accident by which he was injured, he was guilty of contributory negligence, and cannot recover in this action.

70 5th. The court is requested to instruct the jury that if they find that the plaintiff, McElligott, and the witness, Smallwood, at the time of said accident were both in the employment of the District, in the same branch of business, in and about the re-

pairs of the highways of said District, and that said accident arose in the course of their said service, then the plaintiff cannot recover damages in this case for any supposed neglect or misconduct on the part of said Smallwood in and about said service, although they shall further find that said Smallwood at said time was the supervisor for the District of said highways upon which said repairs
71 were being made, and, as such, employed and controlled the services of the plaintiff, unless they shall further find that said Smallwood was unfit and incompetent for the position, of which the District had notice.

6th. If the plaintiff believed that the gravel-bed was in such a condition as to make it dangerous for him to continue work there then it was his right and duty to refuse to expose himself to such danger, and if, with the knowledge of the danger, he continued so to work, and in consequence of his so continuing he received
72 such injury, he was guilty of negligence, and cannot recover in this action.

7th. The burden of proof is upon the plaintiff to show the existence of any custom for having a person to watch the gravel-bed under the circumstances existing at the time at which the accident took place, and if he failed to establish such custom by a preponderance of evidence, then the failure upon the part of the District to have a man on the watch there is not negligence, and the District of Columbia is not responsible in this action.

73 8th. As to the matter of notice to officers of the District, the court is requested to instruct the jury that unless the jury find that the said Mehany mentioned by the witnesses had charge of the work at the gravel-bank when the accident occur-ed, the giving him notice that the bank was in a dangerous state was of no use to the plaintiff in this case.

Which said several instructions the court, as requested by the defendant, granted.

The defendant thereupon asked the court to further instruct the jury as follows:

9th. That if the jury find that notice of such condition was given to the said Smallwood; then unless they also find that he had
74 men at his command at the time, so that he could have complied with the request of the plaintiff, the fact that he did not send a man to watch the bank does not tend to make the District liable in this case.

10th. That considering the proofs upon the fact of whether the plaintiff sent notice to Smallwood of the dangerous condition of said gravel bank, if the jury find that the witness Tracey while on the stand made contradictory statements as to the message sent and delivered by him at one time saying that the plaintiff wanted a man to watch the bank, and then saying that that was not a part
75 of said message, then the jury are at liberty to disregard his evidence wholly, and settle that question by the preponderance of the other evidence in the case.

But the court refused to grant said instructions as prayed, and said that he would instruct the jury upon the subject-matter of said

instructions in lieu of the ones asked for; to which refusal of the court to instruct, the defendant, by its attorney, then and there excepted, and the exception was at the time noted upon the minutes of the justice presiding before the giving of the verdict herein.

And thereupon the court instructed the jury as follows:

76 Now, gentlemen, in one or two points this case will require, as I have no doubt it will receive, the very serious consideration of the jury. You will observe with what care the case has been tried, and the points have been pressed with force and much earnestness.

It is a case in which the plaintiff seeks to receive for an injury which he alleges to have sustained by the want of care or negligence of the defendant. The circumstances of the injury of course are quite fresh in your recollection. It appears that the plaintiff was in the employ of the District, and that he had been employed by the superintendent of highways of the county (Mr. Smallwood) as a laborer, and that the particular service he was engaged in at
77 the time that this accident occurred was shovelling gravel from this bank into the carts to be hauled away for the purpose of repairing the highways, and that whilst he was there engaged the bank gave away and he was caught in the earth and crushed and injured as he has described to you.

Now, the general principle has been stated quite frequently and repeated in the instructions that an employé is not liable for injuries sustained by a person in his service if that injury has been occasioned by the negligence of a fellow-servant or employé in the same work, and it is contended that principle applies in this case to deprive the plaintiff of any remedy against the District; and
78 there can be no doubt that the position is entirely correct, and has been sustained by able justices of the most respectable courts, including the Supreme Court of the United States, so that it is useless now to at all discuss the propriety or policy of this rule of law that has been so well established.

The main question here is whether there is anything in this case to take it out of the operation of that rule.

Now, it is said that if this resulted from the negligence of Mr. Smallwood it was the negligence of one party to the injury of another, and both being in the same employment and in the service of the same master, that, therefore, the plaintiff has no right of action against the District.

79 Now, so far as that is concerned, I am inclined to think that they were engaged in the same employment. This Smallwood was superintendent of the highways and this man was employed by him, and they were working on the highways; that they were carrying out the very purpose for which Mr. Smallwood was appointed, to repair and keep in order the highways of the county.

Notwithstanding this view, there is an element in this case which upon reflection, in view of the decision of the Supreme Court that has been referred to, I have concluded to submit it to the considera-

tion of the jury, and that is the question whether the plaintiff became aware that there was danger of this bank falling and
80 communicated it to Smallwood, who, in reply, gave him the assurance that a person would be sent there for the purpose of watching the bank; and this notice, you will see, this matter of notifying Mr. Smallwood, therefore amounts to an element of very great consequence, so far as the parties are concerned, because unless this notice has been communicatad the plaintiff has no remedy at all; and I am of opinion that his whole right to recover here depends upon that circumstance in the case, because when he entered into this employment he took and assumed all risk incident to that same employment, and if a rock should fall out of the bank and injure him, or the bank itself should fall down and hurt
81 him, as in this case, it is one of the risks incident to his employment which the employé takes upon himself.

The decision of the Supreme Court has introduced another qualification to this general rule in the case just referred to, which they apply to a railroad corporation, who have not furnished a good and sufficient locomotive, in consequence of which an engineer was injured. In that case the engineer was aware of the defect in the locomotive, and he gave notice of that defect to the party whose duty it was to repair it; and who as in this case had the employment and discharge of the plaintiff. The decision of the court in that case was that if the notice was given to this officer, and he gave the engineer assurance that the defect would be remi-
82 died; that the engineer, if he relied upon that assurance, might operate the locomotive for a reasonable length of time without any negligence being attributed to him.

You understand that if a party has been injured by his own fault or negligence, has contributed to the injury that *that* deprives him of any right against anybody else to recover for that injury, because the law will not apportion this negligence between the parties, and strike a balance in favor of either one, but it simply says that where a party has suffered through his own negligence, wholly or partially contributed to the injury, that he shall have no redress.

Now, that engineer and this laborer are upon the same
83 footing; I think if he saw that the embankment was in a dangerous condition and continued to work there with that knowledge of it, it was such contributory negligence as would deprive him of any right to sue the District of Columbia. As I remember, during the argument the men are called upon to exercise their senses and their judgment which they derive from an instinct of personal safety and from their experience in the labor in which they are engaged; and, if they continue to labor under a constant dread of impending danger it is their look out.

The plaintiff in this case, though, swears that he took these precautions, and that he sent two (2) notices to Mr. Smallwood.

Now, it is said that if Mr. Smallwood still neglected, after
84 such notice, that it would still be a neglect of a fellow-servant for which no servant could ever recover any damage. But I have, for the purposes of this trial, instructed you that if the fact of

the dangerous condition of that bank was communicated to Smallwood, and a request made of him to send a man there to watch it, and he gave assurance, in reply, that a man would be sent there for that purpose, that the plaintiff here might labor without any imputation of any negligence on his part for such a length of time as within which that promise might be fulfilled—not to continue there and labor any longer than that, because it would be as much
85 negligence after a reasonable period had expired after receiving this assurance as if no assurance had been given. The law requires that he shall not needlessly expose himself to any danger, to any peril whatever.

And if he has taken this precaution the decision is to the effect that it would not be negligence for him to remain a sufficient length of time to give opportunity to have a man sent there.

Now, this is about all that is necessary to say upon this point.

The proposition, then, is, if the bank was in a dangerous condition, and the plaintiff sent a notice to that effect to Smallwood, and Mr. Smallwood gave, in reply, this assurance that a man would be sent there, then, until a sufficient length of time had expired within which that promise might be fulfilled, the plaintiff
86 might remain there at his work, and if any injury happened to him by the falling of the bank during that time the District might then be imputed with this negligence. If he remained a longer time than within which the promise might be fulfilled, or if he gave no such notice at all, or no such notice was given to Smallwood, then the plaintiff is without any remedy, however serious that injury may be.

I do not think that it makes any difference here whether Smallwood had any man he could send there or not.

Now, the main question, therefore, is, and the one difficulty probably with the jury will have in determining anything in this
87 case, will be as to this matter of notice. On that subject Mr. Smallwood has been examined, as also Mr. Tracey and Mr. Anderson.

Now, the plaintiff names Tracey and Anderson as the persons by whom he sent this message, first by Tracey and then by Anderson.

From Anderson he received no response, because Anderson did not return. He had, therefore, no assurance in reply to that message whatever, and I think, upon the whole, that he had no reason to expect any relief, unless he received assurance such as that given in the case in the Supreme Court. Beyond that I do not think that I ought to go, and I repeat that, without he received this as-
88 surance of assistance, he took the risk of the falling of the bank upon himself, by which, you see, he is very badly injured; but in such a case as that all we can extend to him is our sympathies.

Well, then, that brings us to the man Tracy. Well, now, it is claimed that his testimony is contradictory; that is, that he has said, in the first place, that the message given to him was to tell Mr. Smallwood to send a couple of men there that they might help

to load the carts, and that there might be an opportunity to watch the bank. Well, you heard what he said upon cross-examination.

89 On cross-examination he said that the only message he received was for a couple of men to help load the carts, and then, on re-examination, he said that, whatever the message was, he delivered it as it was given to him, and that it was to the effect that his testimony in the first instance was. Now, I can not tell you, that in view of these contradictory statements in his testimony, that you will have to disregard it; but I can say to you that you are to weigh these contradictions against his credibility, and, if you come to the conclusion that it is to be disregarded, you are at liberty to disregard it, after giving it a careful and discreet examination; you are to consider all the circumstances, whether he is

90 entitled to credit, what kind of credit, and what his testimony amounted to. A witness on the stand sometimes gets confused with the very best intentions, and when it appears he tells us his testimony, although it is contradictory, with the honest intention of telling the truth, he is at least entitled to a fair consideration by the jury.

Mr. Smallwood says that he has no recollection of ever receiving any such message.

That matter stands upon the testimony, therefore, of these witnesses, and you will have to dispose of the question. If you dispose of it against the plaintiff you will render your verdict for the defendant. If you find upon the whole that the plaintiff is entitled

91 to recover you will give him such damages as you think he is entitled to, not vindictive damages, but a fair, reasonable compensation. If you come to the conclusion that the plaintiff has not made out a case upon this notice, to your satisfaction, you will render your verdict for the defendant.

To so much of said charge of the court as instructs the jury, that if the plaintiff gave notice to Smallwood of the dangerous condition of the bank he would be relieved from the imputation of negligence during the time sufficient to enable Smallwood to place a sentinel there to watch the bank, the defendant excepted, and the exception was at the time noted upon the minutes of the justice presiding.

92 And to so much of said charge of the court as instructs the jury, that the alleged notice given by the plaintiff to Smallwood, and the reply of Smallwood to plaintiff, takes the case out of the ordinary rule recognized by the court in granting the first seven (7) prayers of the defendant as governing this class of cases, the defendant then and there excepted, and the exception was at the time noted upon the minutes of the justice presiding.

Each and all of the several exceptions to the rulings and instructions of the court as hereinbefore mentioned were taken by the defendant before the jury retired to consider of their verdict,

93 which was for the plaintiff in the sum of three thousand dollars ($3,000.)

Whether upon the whole the rulings and instructions of the court,

as herein set forth and excepted to, were in accordance with law, and whether the evidence was not insufficient to support the verdict, and whether the verdict was not contrary to the evidence, are questions submitted to the court on this case and bill of exceptions. And in order that the questions herein raised may be heard on exceptions and appeal, in the general term, from the decision of the court overruling the motion for a new trial, noted on the minutes of the court, according to the statutes in such case made and
94 provided, the counsel for the defendant requests the justice who presided at the trial of said cause to sign this his case and bill of exceptions and put his seal thereto, which is accordingly done for them, this — day of May, 1881.

ARTHUR MACARTHUR, *Justice.* [SEAL.]

95 *Proceedings in General Term.*

Proceedings before the supreme court of the District of Columbia, in general term, beginning on the fourth Monday, the 26th day of September, 1881.

Present: Justices James and Cox and Hagner.

* * * * * *

WEDNESDAY, *January* 4, 1882.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter and Justices Hagner and James.

* * * * * *

JOHN MCELLIGOTT, Plaintiff,
*vs.*
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 20872.

Agreed by Mr. Riddle, for defendant, in support of his motion for a new trial, by Mr. Garnett and Mr. Totten, *contra*, and by Francis Miller, for defendant, to conclude to-morrow.

* * * * * *

THURSDAY, *January* 5, 1882.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter and Justices Hagner and James.

* * * * * *

96 JOHN MCELLIGOTT, Plaintiff,
*vs.*
THE DISTRICT OF COLUMBIA, Defendant. } At law. No. 20872.

Argument resumed by Mr. Miller, for defendant, and concluded. Case submitted to the court.

* * * * * *

THURSDAY, *February* 16, 1882.

Session resumed pursuant to adjournment.

Present: Chief Justice Cartter and Justices Hagner and James.

JOHN MCELLIGOTT, Pl'ff,
*vs.*
THE DISTRICT OF COLUMBIA, Defendant. } At law. No. 20872.

Now again come here, as well the plaintiff as the defendant, by their respective attorneys; and thereupon, because it appears to the court here that there is no error in the record and proceedings of the special term, or in its judgment, therefore it is considered
97 by the court here that the said judgment be, and the same is hereby, affirmed, with costs.

The chief justice expresses his concurrence in the opinion of the majority of the court, but explains that the only question in the case is, Did the plaintiff contribute to the injury he suffered? and upon this point, as the case depends upon its own special circumstances, it is not, in his opinion, to be used as a precedent.

* * * * * *

98 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between John McElligott, plaintiff, and the District of Columbia, defendant, No. 20872, law docket 25, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 20 day of February, in the year of our Lord 1882, and of the Independence of the United States the one hundred and sixth.

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To John McElligott.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the District of Columbia, appellant, is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

Service acknowledged February 25th, A. D. 1882.

HENRY WISE GARNETT,
*Of Counsel for Pl'ff.*

[Endorsed:] No. 20872. Law. John McElligott *vs.* The District of Columbia. Writ of error from Supreme Court U. S.

99 *Clerk's Certificate. Authentication of Record.*

CLERK'S OFFICE, SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 11th day of March, 1882.

[Seal of the Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
*Assistant Clerk.*

*Justice's Certificate.*

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 11th day of March, 1882.

D. K. CARTTER, [SEAL.]
*Chief Justice.*

*Clerk's Certificate to Justice's Official Character.*

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 11th day of March, 1882.

[Seal of the Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
*Assistant Clerk.*

Endorsed on cover: District of Columbia sup. court. No. 138. The District of Columbia, plaintiff in error, *vs.* John McElligott. Filed 18th October, 1882.

117.621

FILED
JAN 29 1886
JAMES H. McKENNEY
CLERK

# Supreme Court of the United States.

**OCTOBER TERM, 1885.**

*No. 138.*

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

JOHN McELLIGOTT, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

HENRY E. DAVIS,
*For the Pl'ff in Error.*

JUDD & DETWEILER, Printers.

# Supreme Court of the United States.

**OCTOBER TERM, 1885.**

*No. 138.*

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

JOHN McELLIGOTT, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF IN BEHALF OF THE PLAINTIFF IN ERROR.

*Statement of the Case.*

This action was brought by the defendant in error in the supreme court of the District of Columbia, in June, 1879, to recover damages of the plaintiff in error for personal injuries. The facts are as follows:

On June 12th, 1878, McElligott was in the employ of the District of Columbia, being on that day engaged, under one Smallwood, a supervisor of roads of the District, at a gravel bank, loading gravel into carts. He was assisted by one Meacham and no one else. (R. 6, fol. 18–9.) McElligott and Meacham were employed there together as laborers to fill the carts. (R. 19, fol. 60.)

The mode of working a gravel bank was first to cause a "fall" of gravel from the bank, and then to remove in carts the gravel thus thrown down. A "fall" was made by first undermining the bank, then making what are called cham-

bers or niches in the bank from top to bottom. The chambers would be made at certain distances apart, according to the extent of fall desired. A wedge would then be driven into the top of the bank between the chambers, which would split the bank from one chamber to the other and cause so much of the bank to fall. (R. 19, fol. 57–8.)

On the morning in question no fall was expected (R. 15, fol. 43); there had been no preparation for a fall, as sufficient gravel had previously been thrown down to employ the men loading all that day. (R. 19, fol. 58.) Two or three days before, however, the bank had been undermined and one chamber cut into it (R. 14, fol. 40), which Meacham had cut. (R. 21, fol. 66.) The undermining was about three feet from the corner for about four feet (R. 9, fol. 25); the bank being a hard bank (R. 14, fol. 40), "right long," (R. 9, fol. 25), and varying from one to twelve or fourteen feet high. (R. 14, fol. 40; R. 18, fol. 54.) There had previously been a fall of gravel at the bank (R. 16, fol. 46–7), and there was no digging or chipping into the bank that day by anybody. (R. 15, fol. 42–4.) The only work being done at the bank was the loading into carts the gravel already thrown down (R. 6, fol. 18–19); and this work McElligott and Meacham only were doing (R. 19, fol. 60); "they picked the gravel up to load the carts from the ground, and did not undermine any." (R. 16, fol. 47.) Smallwood was engaged in repairing a road in the neighborhood, twenty or twenty-five minutes' distance in time from the bank, and the gravel was hauled from the bank to be used on the road. (R. 18, fol. 54–6.) In space the distance was three-quarters of a mile. (R. 16, p. 46.)

It is contended by McElligott that it was customary to have a man to watch a gravel bank where others were at work, the duty of the watcher being to stand on top of the bank and give warning of its cracking. (R. 9, fol. 25.) But Meacham, a witness for McElligott (R. 15, fol. 42–3), and Smallwood, a witness for the District (R. 18, fol. 57; R. 19, fol. 58–9), say that a watcher was never employed except when a "fall" was to be made, and no "fall" was intended

or expected that day. Meacham says: "I knew all about the bank, and had made a great many falls there; we were not expecting a fall that day, and I had no idea that it was going to fall." (R. 15, fol. 43.) The bank was not the property of the District; others besides the District were in the habit of resorting to the bank for gravel. (R. 20–1, fol. 65–6.)

McElligott also claims that on going to work that morning he sent word to Smallwood, between nine and ten o'clock, to send him two men, one to watch the bank and the other to help load the carts. (R. 7, fol. 19–20.) The messenger, Tracy, says that he delivered this message to Smallwood, who promised to send men, and Tracy so reported to McElligott (R. 15, fol. 45); but on cross-examination he says, specifically: McElligott "did not say anything to me about watching the bank. He simply sent a message by me for Smallwood to send two men to help load those carts, and that was all. He did not at any time say that he wanted a man to watch the bank." (R. 16, fol. 48–9.) He also says that he reported Smallwood's answer to McElligott in "about fifteen minutes" (R. 17, fol. 50), notwithstanding it took him "about twenty-five minutes to make the trip" from where Smallwood was to the bank. (R. 16, fol. 46.)

No one having reported at the bank after the alleged promise of Smallwood, McElligott claims to have sent him a second message, to the same effect as the first (R. 8, fol. 23–4), about half-past ten o'clock. (R. 12, fol. 33.) The bearer of this message says that he delivered it to Smallwood, who said "All right;" but the messenger did not report this to McElligott. (R. 17, fol. 52.) Smallwood has not the slightest recollection of either of the alleged messages, nor of any message of their sort, nor of any request for additional assistance at the bank that day. He did not send, or intend to send, any other hands to the bank, as the two at work were sufficient. (R. 19, fol. 59–60.)

Having, as he claims, sent the first message between nine and ten o'clock, and the second about half-past ten, McElli-

gott stopped work for dinner at twelve. Notwithstanding no help had been sent, he resumed work at one. (R. 12, fol. 33.) About half-past one, while he was from four to six feet from the bank, Meacham called to him to get away from the bank, which was falling. He started, when the bank fell on him and he was injured. (R. 8, fol. 22–4; R. 14–5, fol. 41–2.) The bank fell of itself. The reason it fell was that it had been undermined and the chamber was cut into it. (R. 15, fol. 42–3.)

McElligott at the time of the accident was forty-five years of age (R. 14, fol. 39); had been engaged in the business of loading carts twenty-two or twenty-three years (R. 7, fol. 21); and had been about the bank in question for a number of years. (R. 11, fol. 30.) He supposed it was dangerous. (R. 12, fol. 34.) "A man to stand under it might as well give up his life." (R. 15, fol. 43.)

The verdict and judgment were for McElligott in the sum of $3,000. The District has sued out a writ of error in this Court.

At the request of the District the court on the trial granted eight prayers for instructions, dealing with the questions of fellow-service, contributory negligence, proof of custom, notice to the District of the dangerous condition of the bank, &c. (R., 21–2); but all these instructions were wholly nullified by the charge of the court, as follows:

"If the bank was in a dangerous condition, and the plaintiff sent a notice to that effect to Smallwood, and Mr. Smallwood gave in reply this assurance that a man would be sent there, then, until a sufficient length of time had expired within which that promise might be fulfilled, the plaintiff might remain there at his work, and if any injury happened to him by the falling of the bank during that time the District might then be imputed with this negligence. If he remained a longer time than [that] within which the promise might be fulfilled, or if he gave no such notice at all, or no such notice was given to Smallwood, then the plaintiff is without any remedy, however serious that injury may be. I do not think that it makes any difference here whether

Smallwood had any man he could send there or not. Now, the main question, therefore, is, and the one difficulty probably the jury will have in determining anything in this case, will be as to this matter of notice." (R. 25, fol. 83–6.) "If you come to the conclusion that the plaintiff has not made out a case upon this notice to your satisfaction, you will render your verdict for the defendant." (R. 26, fol. 91.)

To this the District excepted. (R. 26, fol. 91.)

The District requested the court to instruct the jury as follows:

"That if the jury find that notice of such condition was given to the said Smallwood, then, unless they also find that he had men at his command at the time, so that he could have complied with the request of the plaintiff, the fact that he did not send a man to watch the bank does not tend to make the District liable in this case." (R. 22, fol. 74–5.)

The court refused so to instruct, and the District excepted. (*Ibid.*)

## Assignment of Errors.

The court erred—

1. In holding that the District is liable to McElligott for the alleged negligence of Smallwood in the premises.

2. In instructing the jury that McElligott might continue at work a reasonable time without risk of the consequences, after receiving the alleged assurance from Smallwood.

3. In not submitting to the jury the question, What, under the circumstances, would constitute such reasonable time?

4. In taking from the jury the question, What, under the circumstances, would constitute such reasonable time?

5. In instructing the jury that the case turned solely upon the question whether Smallwood had received the alleged

notice without reference to the question whether such notice had been so received by him to allow what the jury might, under the circumstances, find was a reasonable time before the accident to send the man or men asked for by the plaintiff.

## Argument.

### I.

*The District is not liable to McElligott for the alleged negligence of Smallwood.*

Even assuming the relation of Smallwood to McElligott to be one of superiority, to the extent of vice-mastership, the case is wanting in any feature involving an undischarged or neglected obligation to McElligott. The court below intended to apply to this case the principle recognized in Hough *vs.* Railway Co., 100 U. S., 213, viz: A master is bound to observe all the care which prudence and the exigences of the situation require in providing his servant with machinery or other instrumentalities adequately safe for use by the latter; and if the servant, having knowledge of a defect in such machinery or instrumentalities, gives proper notice thereof and is promised that the defect shall be remedied, his subsequent use of such machinery or instrumentalities in the well-grounded belief that the defect will be remedied within a reasonable time, does not necessarily, or as a matter of law, make him guilty of contributory negligence.

Passing for the moment the question whether that principle has any application to this case, it will be observed—

1. The court, by refusing to grant the rejected prayer of the District, and by its direct statement that it made no difference whether Smallwood had or had not any men to send, no less than by its resting the whole case on the question of the delivery to Smallwood of McElligott's messages, wholly ignored the essential feature of "the care which prudence and the exigencies of the situation require;" for the exi-

gencies of a situation require nothing more than they admit of.

2. The court, ignoring the fact that the alleged promise of Smallwood had been unfulfilled for at least three hours, and that no answer to the second message had been returned after the lapse of two hours and a half, caused the jury wholly to pass the question whether, when he resumed work after dinner, McElligott had a well-grounded belief, or any belief, that the hypothetical "defect" would be remedied. More than this, the court did not touch the question of belief or non-belief on the part of McElligott; it merely told the jury that after his request he might remain at work a certain time at the District's risk.

3. The court, instead of informing the jury that McElligott's continuance at work did not necessarily or as a matter of law make him guilty of contributory negligence, in effect instructed the jury that such continuance at work did not raise or in any sense involve the question of contributory negligence; for, as will be hereafter shown, the question of reasonable time was wholly taken from the jury.

But in fact the principle of Hough's case has no application here. The gravel bank was not machinery or an instrumentality which the District was bound to furnish adequately safe for McElligott's use.

Nor does this case afford occasion to apply the principle of those other cases holding the master bound to furnish men competent for their given duties; for no pretence is made that Smallwood was incompetent.

Nor is the case within the class to which belongs Chicago, &c., Co. *vs.* Ross, 112 U. S., 377; for McElligott was not under Smallwood in such manner or to such degree that Smallwood was directing, controlling, or commanding the operation or movements of any apparatus, instrumentality or physical appliance of any sort in, on or about which McElligott was employed. The principle of Ross' case is that a servant may recover for negligent management, by a superior servant, of an appliance on which the two are en-

gaged in common, which is capable of and requires control and management, and which is in fact under the control and management of such superior servant. The court expressly (p. 394) gives notice that its opinion goes no further than this, and the principle so enunciated does not touch this case.

The question presented in this case is simply this: Is a master liable to a servant for an injury received in the course of his employment, when such injury is occasioned by the failure of a second servant to furnish the assistance of a third, whose assistance the injured servant sees and knows to be essential to his safety, yet, notwithstanding, invites danger by continuing at work without it? Could the conductor of a train of cars, knowing the necessity of a brakeman, and yet embarking upon his train without one, merely because he asked for one which he did not get, recover of his company for an injury occasioned by the absence of the brakeman? Is a master so bound to furnish a servant an adequate corps of fellow-servants that the servant, knowing the danger of working without such fellow-servants, and yet assuming the risk of so doing, may recover for the very injury thereby invited? If so, what becomes of the principle that the servant must encounter, at his own risk, the perils which he "is as likely to know, and against which he can as effectually guard, as the master?" (Farwell *v.* Boston, &c., Co., 4 Metc., 49.) And what effect is left to the declaration of this Court, in Hough's case, "that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed?" (100 U. S., 225.)

Surely, a workman who persists in working at a gravel bank which has been undermined and chambered; which is so dangerous that "a man to stand under it might as well give up his life;" and the danger from which is claimed to have been wholly due to the want of a man to watch it, whose absence the workman not only knows but complains

of; is so "reckless" and "utterly careless of his safety" as to deprive him of all right to demand compensation for an injury thereby brought upon himself.

II.

But if there were an obligation upon the District to furnish a man to watch the bank; and if the principle of Hough's case as to continuing work a reasonable time after notice be thought applicable here; and if it be still further considered that Smallwood stood in such relation to McElligott as to make his negligence in the premises the negligence of the District; yet—

*The question of reasonable time was wholly withdrawn from the jury.*

Not only was the expression "reasonable time" not explained or defined to the jury, but also the wholly erroneous impression was conveyed to it that "a sufficient length of time within which the promise [of Smallwood] *might be* fulfilled" was synonymous with "reasonable time." And by its expressions "the main question, therefore, is * * * as to this matter of notice," "if * * * the plaintiff has not made out a case upon this notice to your satisfaction, you will render your verdict for defendant," the court in effect charged the jury that the accident to the plaintiff happened within a reasonable time after the alleged notice. This was, beyond all doubt, a question for the jury.

HENRY E. DAVIS,
*For the Pl'ff in Error.*

117-621

JAN 29 1886

# Supreme Court of the United States.

**OCTOBER TERM, 1885.**

*No. 138.*

THE DISTRICT OF COLUMBIA

vs.

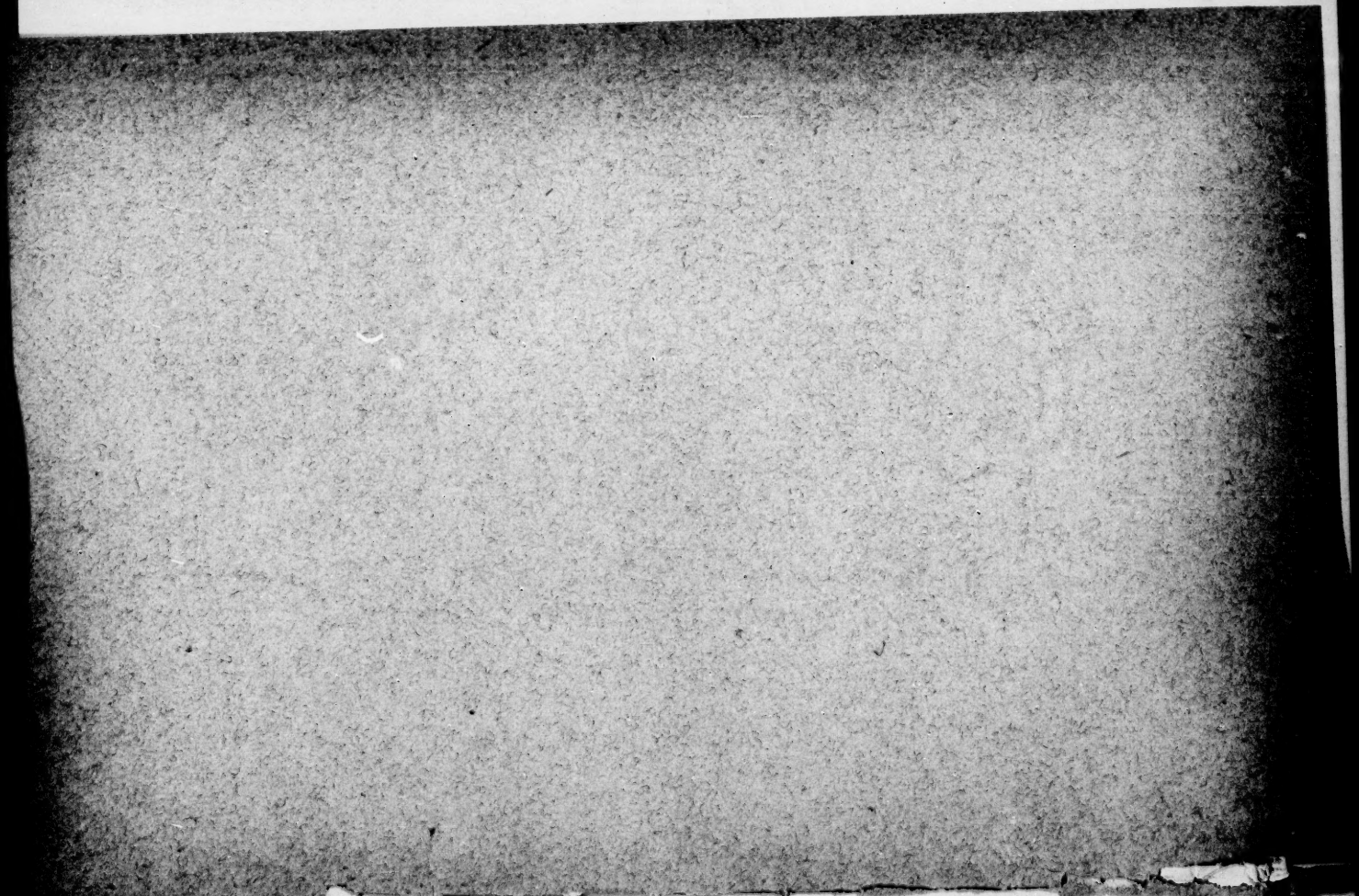
JOHN McELLIGOTT.

*In Error to the Supreme Court of the District of Columbia.*

POINTS MADE FOR THE DISTRICT.

A. G. RIDDLE,
*Attorney D. C.*

JUDD & DETWEILER, PRINTERS.



# Supreme Court of the United States.

**OCTOBER TERM, 1885.**

*No. 132.*

THE DISTRICT OF COLUMBIA

vs.

JOHN McELLIGOTT.

*In Error to the Supreme Court of the District of Columbia.*

## POINTS MADE FOR THE DISTRICT.

### THE CASE.

The plaintiff, a laborer, was employed by the District to load carts with gravel from a bank, not owned by the District, and while so engaged the gravel bank caved, and the fall of earth inflicted a serious injury on him. The evidence on both sides is set forth in a case connected with which are exceptions, as the practice in the circuit of the District courts now is.

It appears that the plaintiff, an expert at the gravel bank, early discovered that the perpendicular face of the bank, some twelve feet high, showed signs of falling, and sent word to Smallwood, who had charge of the work for the District, to send a man to watch it. This was in the morning as early as 9 o'clock. He claimed word was re-

turned that a man would be sent. None was, and he worked on until after the noon lunch, and while at work after 1 p. m. the bank fell.

Smallwood denied receiving any notice or receiving any word until after the accident.

Under the instructions of the court, the jury found that the District had notice of the condition of the bank, and was guilty of negligence. The court's instructions and charge are contained in the case. The last fully states the facts. Rec., pp. 23–26.

In effect the charge is, if the jury found that Smallwood received the notice, the verdict should be for the plaintiff below. That although the parties, McElligott and Smallwood, were in a common service, still after the notice and claimed promise the plaintiff below might remain in the exposed condition a reasonable length of time at the risk of the District. To this the District excepted. Rec., p. 26.

ASSIGNMENT OF ERRORS.

The court erred in its said charge to the jury in this:

*a.* That the District was responsible for the alleged default of Smallwood.

*b.* That McElligott might remain, after receiving the alleged assurance of Smallwood, a reasonable time without risk of the consequences.

*c.* In holding that this question of negligence was matter of law and in not submitting it to the jury as matter of fact.

*d.* In not submitting to the jury what under the circumstances would be such reasonable time for him without risk to so remain.

The general term erred in sustaining the circuit court.

REMARKS.

It is entirely clear that the plaintiff below could never have recovered a verdict on the facts proved had the jury been properly instructed. I could not anticipate the charge, and could only except to it. It is alleged that the plaintiff discovered there was danger the bank would fall before 9 in the forenoon. The court says, as matter of law under the proof, that notice to and reply by Smallwood shifted the whole negligence from him to the District until the accident in mid-afternoon—this, although no custom was shown that the District should provide a watch.

This is one of the clearest cases of contributory negligence ever submitted to a court and jury. McElligott, an expert, discovers danger of a fall in the morning; sends off word and works on; gets a reply, no aid comes, and he still works on. The noon recess comes—still no watchman—and he returns to the danger and lingers there till the catastrophe overwhelms him.

It may be said that I am not at liberty to urge these considerations in this broad way. I must specify something falling within the special rules permitting this court to examine this record.

It is submitted—

I. That McElligott, in undertaking the work at the bank, took upon himself the sole risk of danger—that of a fall. (Randall *vs.* B. & O. R. R., 109 U. S., 478–482; also, 111 *Id.*, 313.) That notice to Smallwood and the alleged reply in no way changed his responsibility.

These men were fellow-servants in the same branch of a common service, and the District is not liable for the default of either to the detriment of the other, notwithstanding Hough's case (100 U. S., 213), the case of Cummings (106 *Id.*, 700), and McDaniel's case (107 *Id.*, 454.)

II. If the better holding is that the District is responsible

for the found acts of Smallwood, as vice-principal (case of Ross; 112 U. S., 337), notwithstanding the assumed risks of McElligott, still no case goes the length of saying that the duty thus imposed upon the District relieved McElligott in the meantime. Knowing the danger, the risk is still his, if he voluntarily remains there.

In Hough's case, the strongest for the other side, an engineer continued to run a damaged engine after notice to the chief of repairs and a promise of repair. The Supreme Court said of this point "that the engineer knew of the alleged defect (in the engine) was not, under the circumstances *and as matter of law, absolutely conclusive* of want of due care on his part."

100 U. S., p. 225.

Not *absolutely conclusive*, but the nearest possible to it.

So far from following this guarded use of words, which left the personal representatives of the engineer the narrowest footing possible before a jury, the court below told the jury the reverse of this rule—that, having given notice, he might work on, and the law conclusively declared that his so remaining was wholly at the risk of the District.

Surely the District has the right to have this important question, upon which the case hinged, submitted to a jury. It was taken from them—a most grave error.

III. So also a material part of this assertion of the law: Having told the jury that the plaintiff below had acquired a right to remain *a reasonable time* at the risk of the District, the court should have told them the legal conditions entering into this compound idea, and left it to them to decide whether the bank waited this reasonable time for the watchman, or whether within its space it fell upon him.

Surely this matter of what space of time would under the circumstances be a reasonable time was a very material question of fact, and while the court did not in terms keep

it from the jury, it did not submit it to them, as it should. The court assumed that the bank fell within this reasonable time.

It is submitted that the judgment must be reversed.

Very respectfully,

A. G. RIDDLE,
*Attorney D. C.*

117-62

Office Supreme Court U. S.
FILED
MAR 1 1886
JAMES H. McKENNEY.
CLERK.

# Supreme Court of the United States.

*No. 138.*

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

*vs.*

JOHN McELLIGOTT, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

HENRY WISE GARNETT.
ENOCH TOTTEN.

JUDD & DETWEILER, Printers.

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*vs.*

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## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT OF FACTS.

This is a suit brought by the defendant in error against the District of Columbia to recover damages for injuries received by him through the fall of a gravel bank upon him, under which he was working. The facts in the case, as shown by the record, are that on June 12th, 1878, the defendant in error, being in the employment of the District of Columbia and under the immediate control and direction of the supervisor of county roads in said District, was, in company with another man, sent to work in the gravel bank known as the "John Brown bank," from which bank the District had been in the habit of obtaining gravel; the means whereby the said gravel was obtained being to undermine the bank and cause a fall of the gravel; that when the bank was being undermined or had been undermined it was usual, customary, and necessary to have a man on top of the bank to watch, in order that as soon as

the bank commenced to crack he might warn those who were under it in time to escape the fall of the gravel; that this bank was from 12 to 14 feet high, and on the morning of the 12th of June, 1878, had been partly undermined; that the defendant in error was put to work at said bank on that morning loading several carts with gravel, which carts were driven away, when loaded, by boys, and the gravel used on the roads; that he went to work at about 8.30 o'clock or nearly 9 o'clock in the morning; that on commencing work, and observing the number of carts and that he had to work in front of and under the gravel bank which had been partly undermined, he sent word to the supervisor of roads to send two more men, one to watch the bank, so that he could work safely, and one to assist in loading the carts; that this message was sent first by the driver of the first loaded cart which left the place where he was working, and the time was between nine and ten o'clock in the morning. This message was delivered to the surpervisor, who, in reply, sent word to the defendant in error that he would send the men, and this reply was given to the defendant in error by the driver within an half hour; and the said defendant in error, because of and relying upon the fulfillment of this promise, continued his work under the gravel bank; that he, by another driver, repeated the request to the supervisor for two men, one to watch the bank and the other to assist in loading the carts, which request was made to the supervisor by the driver as directed; that at 12 m. the defendant in error and his fellow-workman stopped for dinner, and at 1 p. m. returned to work; the defendant in error testified that he was expecting the early arrival of the two additional men the supervisor had promised to send. Very shortly after 1 p. m. the gravel bank fell suddenly, catching and burying him under it; that when dug out he was unconscious, and on being taken to the hospital it was discovered that he had sustained a fracture of the thigh and hip bone, which renders him permanently lame, and also a fracture or depression of the skull; that in-

flammation of the bowels set in and he was for some time expected to die; after four or five months spent in the hospital he was discharged, but was then and will always be unable to do any physical labor, and has to rely for support on other members of his family.

The defendant in error further introduced evidence to show that at the time of the injury the gravel bank had been partly undermined, and that it was usual and necessary, when men were working under a gravel bank in the condition of this, to have a man to watch the bank to give timely warning to those working under it, and that he worked there trusting to the promise of the supervisor to send the necessary men, (p. 10).

The jury gave a verdict in his favor for $3,000 damages.

*Points and Authorities.*

1. There is no bill of exceptions in the record. The paper in the record in lieu thereof is in violation of the fourth rule of practice of this court and of many of its decisions on the subject. (See Blatchford's Rules and notes to rule 4.)

2. This case is governed by the principles established in the case of Hough *vs.* R. R. Co., 100 U. S., 213.

The rules which govern the relations of master and servant on the subject of negligence and personal injuries are the same whether the master be a municipal or private corporation or a natural person.

Cowley *vs.* Sunderland, 6 H. & N., 565.
Brown *vs.* Mayor of N. Y., 3 Barb., 254.
Com. *vs.* Toledo, 41 Ohio St., 49.
Foreman *vs.* Mayor, &c., L. R. 6 Q. B. 214.
Grimes *vs.* Keen, 52 N. H., 330.
Brooks *vs.* Somerville, 106 Mass., 271.
Mersey Docks *vs.* Gibbs, L. R. 1 H. L. 93.

Municipal corporations, like individuals, are liable for the negligent and unskillful acts of their servants and agents whenever those acts occasion special injury to the person or property of another.

Weightman *vs.* City of Washington, 1 Black 50.
Barnes *vs.* District of Columbia, 91 U. S., 540.

In the case of Barnes *vs.* The District of Columbia, this Court, in speaking of the decisions of the New York courts on this subject, uses this language:

"The struggle in the New York courts was between the dictates of that evident justice and good sense which required that the city should indemnify a sufferer for the loss arising from the acts of those doing a work under its authority and for its benefit, and the technical rule which exempted it from liability for acts of officers not under its control or appointed by it."

That the defendant had legal authority to make and repair roads, and to take and use this ground for that purpose, there can be no doubt. The Commissioners of the District of Columbia succeeded to all the power and duties of the Board of Public Works over streets and roads.

16 Stat., 419.
18 Stat., 116.
Barnes *vs.* District of Columbia.
20 Stat., 102.
Cluss *vs.* District of Columbia, 103 U. S., 705.

It is equally clear that Smallwood was the supervisor of roads and was acting under the authority and for the benefit of the defendant.

The court in the instruction to the jury very carefully followed the principles established by this Court in Hough *vs.* R. R. Co.

It will be observed that there was some confusion in the

statements of one of the witnesses who carried one of the messages from the plaintiff to Smallwood, the agent of the defendant, who had control over the plaintiff and his fellow-workmen at the gravel bank. The plaintiff (7) says he sent a message by Tracy to Smallwood calling upon him to send two men, "one to watch the bank" and one to "help load the carts," and that in a few minutes later he repeated the message by the boy Anderson. Both of these messengers testify that they delivered the message to Smallwood (15, 17), and that Smallwood said he "would send the men," and "all right." Tracy testified that he told the plaintiff what Smallwood said. This witness became confused in his cross-examination (16), but finally on re-examination (17) he confirmed substantially what he had said before—that is, that he had received the message from the plaintiff, delivered it to Smallwood, and had brought the answer of Smallwood back to the plaintiff. If there was any question in this it was one of fact, and it has been resolved by the jury in favor of the plaintiff. The whole case, including this feature of the testimony, was fairly and clearly submitted to the jury by the Court (see p. 28), and certainly not with any partiality towards the plaintiff.

We submit that there is no error, and that the judgment of the court below should be affirmed.

HENRY WISE GARNETT.
ENOCH TOTTEN.